

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

77-4183 -84 -91

UNITED STATES COURT OF APPEALS

For The Second Circuit

Western Union International, Inc., RCA Global
Communications, Inc., and ITT World Communications, Inc.,

Petitioners,

-against-

Federal Communications Commission, United States of
America, and American Telephone and Telegraph Company,

Respondents,

-and-

American Telephone and Telegraph Company and
TRT Telecommunications Corporation,

Intervenors.

ON PETITIONS FOR REVIEW OF DECISION AND ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISSION

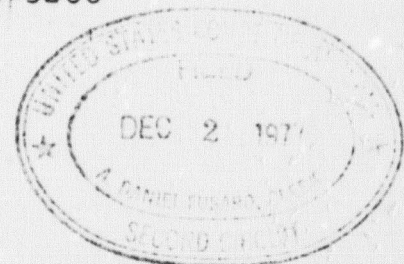
REPLY BRIEF OF PETITIONER
WESTERN UNION INTERNATIONAL, INC.

STROOCK & STROOCK & LAVAN
Attorneys for Petitioner
Western Union International, Inc.
61 Broadway
New York, New York 10006
(212) 425-5200

Of Counsel:

ALVIN K. HELLERSTEIN
ALAN KOLOD

ROBERT E. CONN
MARC N. EPSTEIN
Western Union International, Inc.
1 WUI Plaza
New York, New York 10004



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 77-4183

77-4184

77-4191

WESTERN UNION INTERNATIONAL, INC., RCA GLOBAL COMMUNICATIONS,
INC., and ITT WORLD COMMUNICATIONS, INC.,

Petitioners,

against

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA,
and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,

Respondents,

and

AMERICAN TELEPHONE AND TELEGRAPH COMPANY and TRT TELECOMMUNICA-
TIONS CORPORATION,

Intervenors.

REPLY BRIEF OF PETITIONER WESTERN UNION INTERNATIONAL, INC.

Petitioner WESTERN UNION INTERNATIONAL, INC. ("WUI")* submits this brief in reply to the briefs of respondents and intervenor AT&T. We show below that the FCC failed to come to grips with the fundamental objections raised in our main brief and that the Decision and Orders should be set aside.

* All abbreviations used herein are the same as those defined and used in petitioners' main brief.

I

THE FCC CONCEDES THAT NO ACTUAL
DISCRIMINATION WAS PROVED

The FCC concedes in its Brief that "a provable difference in cost to the carrier could be a possible justification for the differences between the contract and tariff rates". (FCC Br. p. 26) The FCC has repeatedly recognized that cost differences justify rate differences. It did so in its initial Decision (JA 163), during the ex parte meetings (JA 338) and, in a new order of the Commission. (FCC Br. Addendum B)

Although there was no record evidence to establish the presence or absence of a cost difference, the FCC claims to have found that a discrimination did exist. The FCC explains that it was able to do this because "the Commission [had] ample reason to assume that the costs were similar." (FCC Br. p. 26) In other words, the Commission ordered rate equalization because of its assumption that costs might be similar and that, therefore, a discrimination might exist.

The FCC said in its Order that the effect of its Decision was to require AT&T "to avoid the potential for this kind of unlawful discrimination..." (emphasis added) (JA 705) A finding that a discrimination may exist because there may be

no cost difference is not a valid basis for an order requiring rate equalization. (See discussion at pp. 26-34 of our main brief.) But in any event the FCC had no valid reason for assuming that a cost difference did not exist, as is made clear from an analysis of the two reasons given in its brief:

1. The FCC defends its assumption that no cost difference exists by reference to a statement made by a representative of AT&T at a settlement conference held by the IRCs and AT&T under FCC auspices. (FCC Br. p. 26) The AT&T representative is reported by the FCC to have stated that the IRC and OCC facilities are physically and essentially the same and that therefore no lower charge to the IRCs could be justified. (FCC Br. p. 21) (JA 656) Statements at a settlement conference are, of course, not admissible. Fed. R. Evid. 408. More importantly, the statement is conclusory and unsupported by any factual evidence. It contradicts the AT&T statement to the FCC during the March 31 ex parte meeting that there was a "difference in the cost of building IRC entrance facilities vis-a-vis OCC entrance facilities." (JA 338). And it is carefully worded so that the statement about no cost differences is made, not as a statement of fact, but as an inference from a disputed premise.

2. The FCC defends its assumption by asserting that the IRCs failed to claim that cost-justification existed in the proceedings below. (FCC Br. p. 26, 27, 42) The assertion is false. The IRCs raised the question of cost differences in their petitions seeking suspension and rejection of the tariffs. (JA 395, 457, 591, 601, 621) (FCC Br. p. 26 n.25). Those petitions were before the FCC at the time, and were decided by it in the same Order in which, it reconsidered its initial Decision. (JA 328) (FCC Br. p. 26 n.25)

At the time it issued its Decision and Order, the FCC was in no position to know whether cost differences existed. AT&T itself could not say, because cost materials were then, and still are, being developed. Those materials will not be available until December 1978 at the earliest. (JA 720, 737) In these circumstances, the FCC had no basis for concluding or assuming that rate equalization was appropriate. The FCC itself has recognized this fact by granting AT&T the right to file tariffs containing lower rates for the IRCs, if these could be cost-justified. (JA 163, n.8) (FCC Br. p. 35, Addendum B)

Furthermore, the FCC's order to AT&T to equalize the domestic and IRC rates may itself be discriminatory against the IRCs for as the court stated in Trailways of New England, Inc.

v. CAB, 412 F.2d 926, 933 n.15 (1st Cir. 1969), a discrimination in violation of the statute exists when equal rates are charged for different services.

II

ALLEGED FUNCTIONAL SIMILARITY DOES NOT ESTABLISH IDENTITY OF COSTS AND IS NOT A SUBSTITUTE FOR A FINDING OF LIKENESS

The FCC asserts that it met its burden of proving "likeness" and "discrimination" by making a finding that the services in question were "functionally similar." But the existence of "functional similarity" does not establish that the costs are the same. DDS, 62 F.C.C.2d 774 (1977). "Functional similarity" is not an adequate substitute for a finding of "likeness", for it is but one of many factors that are relevant and it implies nothing at all as to whether costs are different or the same. Because the remedy for a finding of rate discrimination is rate equalization, the question of costs is crucial. As the court states in Atchison Topeka & Santa Fe Railway v. United States, 218 F. Supp 359 (N.D. Ill, 1963), a finding of similarity of services is fundamental or quasi-jurisdictional to a finding of discrimination or undue preference. Therefore, without such a finding of similarity or likeness in services, and comparative costs, there can be no basis for ordering the

elimination of a rate differential.

Findings of likeness and discrimination require determinations of fact, not of law, and can only be made upon an evidentiary record. The FCC's use of a factually sterile notion of "functional similarity" as a substitute for a factual inquiry into the actual cost, technical and service characteristics of the two facilities is indefensible.¹

According to the FCC, it appears two services are "like" if their functions can be described in one sentence. That facile, factually barren description then renders all actual differences between facilities "irrelevant" (FCC Br. p. 25, n.23). Thus, the fact that the facilities are voice-grade (as are virtually all the AT&T, OCC and IRC facilities) is said to be crucial and to make irrelevant the existence of actual technical differences, the existence of differences in the forms of services offered the public, and the existence of differences arising from the history of the relationship between AT&T and the IRCs and the fiduciary duties of AT&T to the IRCs incident to that relationship. (FCC Br. p. 22) Mechanical

1 The FCC's notion that a finding of a "functional similarity" creates a prima facie showing of "likeness" which the IRCs must rebut by evidence of "unlikeness" (JA 703) has no support in the case law. The cases cited by the FCC, at best, hold only that once actual "likeness" is proved then a prima facie discrimination has been shown and facts to justify the discrimination must be presented in rebuttal.

application of the FCC's approach to "functional similarity" could obliterate all existing service classifications involving voice-grade facilities. The resulting rate equalization would be chaotic.

The FCC's unwillingness to acknowledge that a finding of likeness depends upon factual similarity developed by record evidence is demonstrated by its attempt to distinguish the cases interpreting sections 2 and 3(1) of the Interstate Commerce Act. 49 S.C. §§2, 3(1). Petitioners cited those cases to show that a discrimination can be found only when the evidence establishes that the services in question are factually "like". Under the Interstate Commerce Act such likeness is established by proving that the services are identical and that the points of origin and destination and the routes of transport are the same, thereby establishing identity of cost. Under the Interstate Commerce Act, if likeness cannot be established because of a difference in cost or routing or points of origin or destination, then no discrimination exists. The agency may still find the existence of a preference, but only if competitive injury is also established.

The FCC's assertion of functional similarity does not even approach the standard of proof necessary to establish likeness. But without such a finding of likeness, there is no

justification for its conclusion that a discrimination existed which could only be eliminated by price equalization. The FCC itself is troubled by this fact. In its Order it purported to foreclose the IRCs from ever again raising the question of cost-differences, a proper result if the matter had been properly determined. (JA 722) But in its most recent order the FCC acknowledges that the question was not answered and may be litigated in future proceedings. (FCC Br. Addendum B)

III

THE FCC'S REFUSAL TO CONDUCT AN EVIDENTIARY HEARING PREJUDICED THE IRCs

The FCC attempts to show that the Commission actually had factual information to support its conclusions of "likeness" and "discrimination". (FCC Br. pp. 21, 26) This effort to bolster the FCC's decision by the use of extrinsic, non-record evidence only emphasizes the need for some type of evidentiary hearing. Indeed, the litany of facts recited in the FCC Brief to impress this Court is in large part erroneous.²

2 For example, a conversion is necessary at submarine cable stations from 3000 Hertz to the 4000 Hertz tail circuits; such conversion is not needed for domestic entrance facilities. Super-group technology is not offered to the IRCs under AT&T's tariffs at issue, and certainly not under Tariff No. 265. No IRC is

The notice and comment procedure used in the present case did not afford the IRCs an adequate opportunity to develop their case and was certainly not comparable to the "paper hearing" procedure used by the FCC in the Hi-Lo case. AT&T (Hi-Lo), 55 F.C.C.2d 224 (1975, on reconsideration, 58 F.C.C.2d 362 (1976)). In a paper hearing, the FCC trial counsel bears the burden of creating a record by filing its "direct case". In turn it is subject to written interrogatories and to the responsive "rebuttal case" filed by AT&T and the IRCs. By refusing to use that adversarial hearing procedure in the present case, the FCC deprived the IRCs and AT&T of any knowledge of its contentions, thereby making rebuttal impossible. Use of an open-ended, undirected, non-adversarial procedure was condemned in Morgan v. United States, 304 U.S. 1, 18 (1938), even though the hearing had been evidentiary and permitted oral testimony.

The FCC's refusal to conduct the proceeding as a hearing also prevented the IRCs from taking advantage of the right to obtain discovery under Commission rules. Without such discovery, WUI had no access to the cost and other technical information known to AT&T and the Domestic Carriers.

footnote continued

licensed to operate to any Valley Forge earth station. The FCC Brief is rampant with factual misstatements (FCC Br. 18, 19, 20).

The absence of an adversarial hearing was made more grievous by the FCC's use of unspecified information obtained by FCC staff members during the course of their several months participation in the settlement negotiations in FCC Docket 20099. (FCC Br. p. 21) The information learned by the Commission during those negotiations should have been made part of the record in the presentation of the FCC's direct case. It then would have been subject to cross-examination and rebuttal by the IRCs. Written interrogatories might have met the needs of the IRCs for cross examination, for certainly some sort of cross examination was necessary, particularly in light of the fact that the FCC admits it relied upon unsworn, conclusory assertions by representatives of AT&T that the services were similar technically and that no cost-justification could be given for the lower IRC rates. (FCC Br. p. 21, 26) (JA 702)

Had that evidence been placed in the record, this Court would be able to determine whether that evidence gave substantial support to a finding of likeness. The FCC's improper reliance on unspecified, non record information makes such a determination by this Court impossible. See Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937); United States v. Abilene & S. Ry. Co., 265 U.S. 274 (1924).

IV

THE COMMISSION HAS UNLAWFULLY
PRESCRIBED AT&T's TARIFFS

The FCC fails to respond to petitioners' prescription argument (FCC Br. p. 43-53). Instead, the FCC contends that WUI once admitted in a letter (JA 675) that AT&T had a choice as how to remedy the alleged discrimination, thus implying that there had been no prescription. Examination of the letter makes clear that WUI was only restating the FCC Staff's position to AT&T in an effort to persuade AT&T that it could lawfully enter into a compromise. A more accurate statement of the effect of the FCC's decision can be found in AT&T's letter of September 20, 1977, in which it explained why it did not believe it could lawfully file a compromise tariff:

"As we have previously stated both at the September 7 meeting and in pleadings related to the transmittals in question, the actions that have been taken by us in the form of tariff filings...have, in our view, been actions required by the Federal Communications Commission". (JA 672) (Emphasis Added)

The FCC prescribed AT&T's tariff rates for the IRCs. The four options (enumerated on p. 45 of our main brief) allegedly available to AT&T to cure the "discrimination" simply did not exist. It was impossible for AT&T to comply with the

Decision except by filing tariffs increasing the IRC's rates to the domestic level within 30 days after the FCC's March 23 decision. The FCC's Brief itself admits that AT&T could not file different rates for the IRCs without cost-justification material (FCC Br. p. 35). That material, however, will not be available until December 1978. (JA 720, 737) AT&T could have equalized the rates only by raising the IRC rates, lowering the domestic OCC rates or modifying both. But AT&T could not have reduced or modified the domestic OCC rates because:

1. Cost-justification for any OCC rate decrease would have been necessary under the terms of the Settlement Agreement. (JA 56) This is to protect against the possibility that AT&T may charge an excessively low rate which must be compensated for by higher rates to other users.

2. The domestic OCC rates could only be changed by "new tariffs" filed by AT&T at least nine months prior to their effective date. AT&T Offer of Facilities for Use by Other Common Carriers, 25 F.C.C.2d 727 (1975) (JA 56-57) The FCC required compliance with its Decision within 30 days. (JA 165)

Clearly, AT&T's only option was to raise the IRC tail circuit rates to the existing OCC tariff level.

We appreciate that the FCC adopted a new order on November 30 (FCC Br. p. 37), or will do so on December 30

(Addendum B to FCC Brief),³ purporting to remedy one of the deficiencies highlighted in our main brief (p. 50). This new order, published through the medium of the FCC's December 1 brief, rather than through usual procedures, appears to remove the prohibition in the October 25 Order against the IRCs proving cost differences for tail circuits and entrance circuits in a future FCC proceeding. This illustrates that the FCC realizes it had no basis for ordering rate equalization. Rates should not be ordered equalized on a set of assumptions when the FCC itself realizes that its action may well be unjustified in the light of proofs.

Despite the apparent relief granted to the IRCs in this new order, there is no assurance that the FCC ultimately would require reimbursement of excess charges, even if the IRCs could demonstrate lower costs for their tail circuits. The reference in the FCC brief (FCC Br. p. 28) to the complaint procedures provided by 47 U.S.C. 208 gives no real remedy to the IRCs. See Affidavit of Robert E. Conn submitted in support

3 If December 30 is the correct adoption date, this new order is merely an FCC staff proposal and not an official order. If this new order was adopted on November 30, then it was adopted in violation of the FCC's "Sunshine Rules", Implementation of the Government in Sunshine Act, 63 F.C.C.2d 326 (1977). The only justification for such an action without public notice is that such action was "required" prior to next week's regular FCC meeting, 63 F.C.C.2d 329, which suggests that the FCC could not permit its record as presented in the Joint Appendix to stand.

of petitioners' Motion for Stay. (pp. 6-7) The FCC's new order is one more example of its willingness to continually "wink" at its own procedural requirements in order to justify its actions in this case. Thus basic, fatal deficiencies described in our brief unfortunately remain unremedied.

V

THE EX PARTE MEETINGS VIOLATED FCC RULES

Both the FCC and AT&T claim that the Commission's ex parte rules are not applicable to the four meetings held by the FCC with AT&T. It is stated that the meetings did not involve the merits of Docket No. 20452 but only dealt with a new tariff proceeding. This hairsplitting attempt to evade the FCC's own rules is contrary to the policy set forth therein.⁴

This case cannot be divided into two separate proceedings. Docket No. 20452 and the tariff filings made pursuant thereto are inextricably intertwined. The Commission, in its Order of June 9, 1977 (JA 327), so mandated:

"We will act on the merits of the pending Petitions for Reconsideration and Clarification in light of the tariff filings made by

4 The FCC itself has recognized the danger that a party may "use the pendency of other matters as a pretext for ex parte communications going to the merits or outcome of a restricted proceeding." Rules Governing Ex Parte Communications, 1 F.C.C.2d 49, 58 (1965).

AT&T and any comments filed with respect thereto." (JA 328).

At the time of the ex parte meetings, Docket No. 20452 was still subject to petitions for rehearing and, thus, was still restricted. 47 C.F.R. §1.1207. The ex parte rules remained applicable and could not be ignored. The FCC nevertheless disregarded its rules in order to remedy material defects in its Decision. The FCC was enabled by those meetings:

1. To clarify and make explicit its prescription of AT&T's rates.

2. To modify the Decision so that AT&T could comply with it and nevertheless continue to provide the services required for overseas communications.

3. To avoid its obligation to create an adequate record subject to judicial review.

4. To learn about cost and technical differences between the IRC's tail circuits and the entrance facilities used by domestic carriers out of the presence of the IRCs.

The FCC and AT&T argue that the ex parte meetings, even if they violated FCC rules, did not prejudice the IRCs because of their opportunity to comment. That opportunity to comment on a description of the meetings cannot cure the FCC's active participation in those meetings. Furthermore, the argument misconstrues the nature of the IRCs' objection. The IRCs

do not contend that AT&T used these meetings to convey information to the FCC that prejudiced the IRCs. Rather, the FCC was enabled by these meetings to patch over the flaws in its Decision and, thereby, prevent exposure of the totally inadequate procedures used in this Docket. The real, factually based decisions, as to which IRC services were "genuinely" like and unlike the domestic carrier facilities, were made in these ex parte meetings without IRC participation. (See FCC Br. p. 12)

A few illustrations will suffice. AT&T and the FCC interpret AT&T's statements at the March 31 meeting as not being an assertion that cost differences exist, while the IRC's interpret it as an assertion that they do exist.⁵ Likewise, the FCC summary says a blackboard was used to explain the operation of tail circuits and, further, that some differences in technology were discussed. What was actually said by AT&T, however, is not disclosed. Since the FCC contends IRC and OCC facilities are "like", its failure to "remember" the differences discussed is what is prejudicial, and deprives this court of a full record for review.

5 The statement in question was, as the FCC summarized it:

"AT&T once started to discuss the 'difference' in cost of building IRC entrance facilities vis-a-vis OCC entrance facilities" (JA 338)

AT&T informed the FCC of evidence of differences between the IRC and OCC circuits under circumstances that insured that the IRCs would not learn of these differences and would have no opportunity to explore or develop them. Thus, the FCC was enabled to learn and decide behind closed-doors, without public or IRC scrutiny and without a record for judicial review, those features of AT&T's service to the IRCs which should be included within the tariff applicable to the domestic carriers, those which should be included within the tariff applicable to the IRCs and those which could remain under contract.

Conclusion

For the reasons stated above and in petitioners' main brief, the Court should vacate and set aside the Commission's Decision and Orders and the AT&T tariffs filed pursuant thereto.

New York, New York
December 2, 1977

Respectfully submitted,

STROOCK & STROOCK & LAVAN
Attorneys for Petitioner
Western Union International, Inc.
61 Broadway
New York, New York 10006
(212) 425-5200

Of counsel:

ALVIN K. HELLERSTEIN
ALAN KOLOD
STROOCK & STROOCK & LAVAN

and

ROBERT E. CONN
MARC N. EPSTEIN
WESTERN UNION INTERNATIONAL, INC.
One WUI Plaza
New York, New York 10004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index ~~NOX~~ NOS.
77-4183, 4184, 4191

WESTERN UNION INTERNATIONAL, INC., et al.,
petitioners,

~~Richard~~

against

FEDERAL COMMUNICATION COMMISSION, et al.,
Respondents,

-and-

AMERICAN TELEPHONE & TELEGRAPH COMPANY ~~XXXXXX~~
et ano., ~~XXXXXX~~
Intervenors.

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

The undersigned being duly sworn, deposes and says:

RICHARD SLATE

Deponent is not a party to the action, is over 18 years of age and resides at
174 Amity Street, Brooklyn, New York 11201

That on December 2, 1977 deponent served the annexed two copies of
BRIEF OF PETITIONER WUI, INC.

on SEE ATTACHED SERVICE LIST

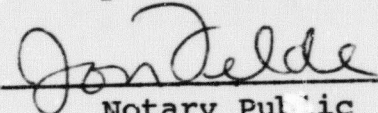
attorney(s) for SEE ATTACHED SERVICE LIST

in this action at SEE ATTACHED SERVICE LIST

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in ~~XXXXXX~~ official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

Sworn to before me this
2nd day of December, 1977

The name signed must be printed beneath
RICHARD SLATE


Notary Public

JON FELDE
Notary Public, State of New York
No. 24-4641826
Qualified in Kings County
Commission Expires March 30, 1979

Index No.

against

Plaintiff

Defendant

**ATTORNEY'S
AFFIRMATION OF SERVICE
BY MAIL**

STATE OF NEW YORK, COUNTY OF

SS.:

The undersigned, attorney at law of the State of New York affirms: that deponent is
attorney(s) of record for

That on

19

deponent served the annexed

on

attorney(s) for
in this action at

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed
in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care
and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law

SERVICE LIST

H. Richard Schumacher, Esq.
Cahill Gordon & Reindel
80 Pine Street
New York, New York 10005
Attorney for RCA Global Communications, Inc.

John S. Kinzey, Esq.
LeBoeuf, Lamb, Leiby & MacRae
140 Broadway
New York, New York 10005
Attorney for ITT World Communications, Inc.

Roderick A. Mette, Esq.
TRT Telecommunications Corporation
1747 Pennsylvania, N.W.
Washington, D.C. 20006
Attorney for TRT Telecommunications Corporation

Hon. Robert E. Bruce, Esq.
General Counsel
Federal Communications Commission
1919 M Street
Washington, D.C. 20054
Attorney for The Federal Communications Commission

Hon. Griffin H. Bell, Esq.
Attorney General of the United States
U.S. Department of Justice
Washington, D.C. 20054
Attorney for the United States of America

Alfred C. Partoll, Esq.
Gerald E. Murray, Esq.
American Telephone & Telegraph Company
195 Broadway
New York, New York 10017
Attorneys for American Telephone & Telegraph Company

Edgar Mayfield, Esq.
James Golden, Esq.
American Telephone & Telegraph Company
Bedminster, New Jersey 07921
Attorneys for American Telephone & Telegraph Company

Jack David Smith, Esq.
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W. Room 610
Washington, D.C.
Attorney for Respondent Federal Communications Commission

Barry Grossman, Esq.

Appellate Section

Antitrust Division

United States Department of Justice

10th and Pennsylvania Avenue, N.W. Room 3313

Washington, D.C.

Attorney for Respondent United States of America

Joseph Jacobs, Esq.

ITT World Communications, Inc.

67 Broad Street

New York, New York

Attorney for ITT World Communications, Inc.

Charles Lehrhaupt, Esq.

RCA Global Communications

60 Broad Street

New York, New York

Attorney for RCA Global Communications, Inc.

